In the Supreme Court of the United States.

OCTOBER TERM, 1976.

No. 76-1040

THOMAS SANABRIA,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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Table of Contents.

Table of Authorities Cited.

CASES.

CONSTITUTIONAL AND STATUTORY PROVISIONS.

MISCELLANEOUS.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Thomas Sanabria petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit entered in this case on December 29, 1976.

Opinion Below.

The opinion of the court of appeals, not yet reported, is reproduced as Appendix A. No opinion was rendered by the district court.

Jurisdiction.

The judgment of the court of appeals was entered on December 29, 1976, and this petition is being filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Questions Presented.

1. Do 18 U.S.C. § 3731 and the double jeopardy clause permit the Government to appeal from an evidentiary ruling made after jeopardy has attached, when the defendant is ultimately acquitted, and a new trial would be necessary in the event the Government's appeal were successful?

2. Do 18 U.S.C. § 3731 and the double jeopardy clause permit the Government to appeal from a decision, made after jeopardy has attached, dismissing a "discrete basis of criminal liability" which constitutes less than an entire count of an indictment, considering that the effect of a rule permitting such an appeal would be to expand greatly the number of legal rulings appealable by the Government and to undermine substantially the finality of judgments of acquittal?

3. The petitioner was charged in a single count indictment with violating 18 U.S.C. § 1955, which makes it a federal crime to engage in "an illegal gambling business." The federal statute defines such a business as one which, among other

things, involves five or more persons and is in violation of state law. At petitioner's trial, the Government introduced evidence that the single gambling business charged in the indictment involved illegal state betting on (a) horse races, and (b) numbers. The court excluded evidence of the numbers activity on the ground that this theory of criminal liability was not encompassed by the indictment. The court then found that the evidence of horse betting was insufficient to support a conviction, and entered a judgment acquitting the petitioner.

Do 18 U.S.C. § 3731 and the double jeopardy clause permit the Government to appeal from the trial court's ruling on the evidence of numbers activity, when the single count indictment charged only one crime and the Government concedes it is barred from appealing the acquittal as to the ruling on the horse betting?

4. The indictment described in No. 3, above, cited a solitary provision of Massachusetts law which has been construed by the Massachusetts courts not to refer to numbers activity — a type of betting made illegal by another provision of Massachusetts law, not cited in the indictment.

In view of this fact, would a conviction on the basis of evidence of numbers activity be consistent with the requirement of the Sixth Amendment that a defendant be fairly informed of the charges against him, and of the Fifth Amendment that a defendant be tried only on the charges made by the grand jury that indicted him?

Constitutional Provision and Statute Involved.

The Fifth Amendment to the United States Constitution provides in pertinent part:

". . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . . ."

Section 3731 of Title 18 of the United States Code provides in pertinent part:

> "In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution."

Statement of the Case.

Petitioner Thomas Sanabria and fifteen others were indicted for allegedly violating 18 U.S.C. § 1955, which makes it a federal crime to engage in an "illegal gambling business." The federal statute defines such a business as one which, among other things, involves five or more persons and is in violation of state law. The one count indictment charged the defendants with engaging in:

> "an illegal gambling business [involving] . . . accepting, recording, and registering bets and wagers on a parimutual [sic] number pool and on the result of a trial and contest of skill, speed and endurance of beast . . . [in] violation of the laws of the Commonwealth of Massachusetts, to wit, M.G.L.A. Chapter 271, Section 17. . . ."

At trial, the Government introduced evidence purporting to show that the single gambling business charged in the indictment involved illegal state betting on (a) horse races, and (b) numbers. After both sides had rested, petitioner Sanabria and his codefendants moved[1] to strike as irrelevant that portion of the Government's evidence which pertained to numbers activity. They argued that the only Massachusetts statute cited in the indictment — Mass. G.L. c. 217, § *17* — had been interpreted by the Massachusetts courts to pertain exclusively to gambling activity involving apparatus used in betting based on a game of competition, such as horse racing. *See Commonwealth* v. *Boyle*, 346 Mass. 1, 189 N.E. 2d 844 (1963). They maintained that numbers activity was prohibited only by Mass. G.L. c. 217, § 7.

Persuaded by this argument, the district court held that the policy that criminal defendants receive notice of the charges against them would be violated if the numbers aspect of the case were permitted to proceed. Accordingly, the district court excluded the Government's evidence of numbers activity and ruled that the case could go to the jury solely on the Government's horse betting theory.

Petitioner Sanabria then moved for a judgment of acquittal on the ground that there was insufficient evidence of his involvement in horse betting gambling to support his conviction on this basis. Focusing on the evidence of horse betting against Sanabria, and finding that it was indeed insufficient, the district court granted his motion. The district court permitted the case against Sanabria's ten[2] codefendants to proceed, however, and the jury found each one guilty.

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[1] This was a renewal of a motion that the defendants had made previously, without success, at the close of the Government's case.

[2] As indicated earlier, the indictment names fifteen codefendants, but, for reasons not pertinent here, the number had decreased to ten codefendants by the time of trial.

The Government sought appellate review of the district court's decision to acquit Sanabria. It conceded that there could be no review of the ruling that there was insufficient evidence of Sanabria's involvement in horse betting to support a conviction on that theory. But it maintained that there could be review of the decision to exclude the evidence of numbers activity, and requested that a new trial be ordered to give the Government the opportunity to convict Sanabria on that theory.

Observing that the case presented "several substantial questions" concerning the Government's right to appeal from an adverse decision in a criminal case (A. 2a), the court of appeals found that the district court's decision to exclude the evidence of numbers activity was indeed reviewable under 18 U.S.C. § 3731. Turning to the merits, it ruled that the lower court had erred in "dismissing" the "numbers based charge" and remanded the case so that the Government could retry the defendant on this "portion of the indictment" (A. 12a).

Reasons for Granting the Writ.

The decision below conflicts with this Court's decisions in *United States* v. *Jenkins*, 420 U.S. 358 (1975), *United States* v. *Wilson*, 420 U.S. 332 (1975), and *Serfass* v. *United States* 420 U.S. 377 (1975). It raises important questions regarding the interpretation of 18 U.S.C. § 3731 and the double jeopardy clause, which should be settled by this Court. And it conflicts with the Eighth Circuit's decision in *United States* v. *Means*, 513 F. 2d 1329 (1975).

I. The Decision Below Violates the Holding of United States v. Jenkins Because it Authorizes "Further Proceedings . . . Devoted to the Resolution of Factual Issues" Following a Trial that Ended "in the Defendant's Favor."

In three cases decided in early 1975 — *United States* v. *Wilson*, 420 U.S. 332; *United States* v. *Jenkins*, 420 U.S. 358; and *Serfass* v. *United States*, 420 U.S. 377 — this Court formulated a bright line test for determining when the double jeopardy clause bars further prosecution of a defendant. That test provides that when, after a defendant is placed in jeopardy, a trial terminates "in [his] favor," the defendant is shielded from "further proceedings . . . devoted to the resolution of factual issues going to the elements of the offense charged." *United States* v. *Jenkins*, 420 U.S. at 365, n. 7, 370 (1975).[3]

[3] In *Serfass*, the Government appealed from a pretrial order dismissing the indictment. This Court upheld the Government's right to appeal because, by virtue of the fact that the trial court was without power to make any determination on defendant's pretrial motion regarding his guilt or innocence, the defendant had never been placed "in jeopardy." Accordingly, any further proceedings that might ensue on a successful Government appeal would not subject the defendant to double jeopardy. 420 U.S. at 389-392.

In *Wilson*, the Government sought review of a postverdict decision dismissing the indictment for prejudicial delay in bringing the defendant to trial. This Court ruled that the appeal was permitted because any error of law in the trial court's decision could be corrected, and the guilty verdict could be reinstated, "without subjecting [the defendant] to a second trial before a second trier of fact." 420 U.S. at 345.

In *Jenkins*, the Government appealed from a decision dismissing the indictment following a bench trial. Stating that it could not determine "with assurance whether [the trial court's decision] was, or was not, a resolution of the factual issues against the Government" (420 U.S. at 369-370), this Court, nevertheless, found that the Government's appeal was barred because there was no adjudication of guilt that could be reinstated in the event the appeal was successful. Further proceedings bearing on factual issues going to the elements of the offense charged would be necessary and, even if all that was required was for the trial court to make supplemental findings on the basis of evidence already received, that would suffice to raise the bar of double jeopardy. 420 U.S. at 370.

When this test is applied here, it is plain that the Government's appeal from the judgment acquitting Sanabria is constitutionally barred. Sanabria was placed in jeopardy; the trial terminated in his favor; and, if a Government appeal were successful, further proceedings would be necessary to establish his guilt. Under *Jenkins*, the basis of the ruling in Sanabria's favor is immaterial.[4] "[I]t is enough for purposes of the Double Jeopardy Clause . . . that further proceedings . . . would . . . [be] required upon reversal and remand." 420 U.S. at 370.

[4] The only possible exception to this was indicated in *Serfass* v. *United States*, 420 U.S. at 394, where this Court expressly reserved judgment on the hypothetical situation of

> "a defendant who is afforded an opportunity to obtain a determination of a legal defense prior to trial and nevertheless knowingly allows himself to be placed in jeopardy before raising the defense."

The court below alluded to this hypothetical but ruled that it was not presented by this case. The court reached this conclusion because it interpreted the reserved issue to refer only to the situation of a defendant "who prevails at trial because of the trial judge's interpretation of the substantive criminal law" (A. 9a), that is, a defendant who receives a legal determination that his "conduct was such that criminal liability [cannot] be imposed" (A. 9a). The court found that petitioner Sanabria did not fit into this category because the dismissal he received was not based on an evaluation of the conduct alleged but merely on a determination that he had not received proper notice of the numbers charge.

Petitioner Sanabria agrees that he does not come within the hypothetical described in *Serfass* but not for the reason indicated by the court of appeals. In fact, Sanabria does not come within the hypothetical because he was acquitted, not on the basis of a legal defense which he could have raised before trial, but rather on the basis of a factual determination that could only have been made at trial.

II. The Lower Court's Attempt to Distinguish Jenkins not Only Fails; it Articulates Unprecedented Doctrines which would Subvert the Entire Structure of Double Jeopardy Analysis Adopted by this Court.

In attempting to justify the Government's right to appeal in the face of *Jenkins*, *Wilson* and *Serfass*, the court of appeals sought to establish four propositions:

1. For purposes of 18 U.S.C. § 3731 and the double jeopardy clause, the district court's ruling that the evidence of horse betting was insufficient to support conviction is separable from its ruling that the evidence of numbers activity had to be excluded (A. 4a-7a).

2. The district court's decision with respect to numbers activity was in reality not an "evidentiary ruling," but was rather a ruling that the indictment failed to charge a violation of 18 U.S.C. § 1955 on a numbers theory (A. 6a, n. 5).

3. Even though this ruling on the insufficiency of the indictment was admittedly made after jeopardy attached, a future prosecution will not offend the Constitution because "[n]either the judge nor the jury ever focused on what the evidence of numbering activities established regarding defendant's conduct or on whether the alleged conduct was such that criminal liability could be imposed" (A. 8a).

4. Sanabria's motion to exclude the evidence of numbers activity was the equivalent of a motion for a mistrial not occasioned by prosecutorial or judicial overreaching (A. 10a-11a).

Each of these propositions is a necessary link in the chain of reasoning adopted by the court of appeals. If any one of these propositions is invalid, the court's conclusion cannot stand. In fact, all four of the propositions are invalid. We will consider them in turn.

A. *The Judgment of Acquittal was Unitary and Indivisible: The District Court's Ruling on Numbers Activity Cannot be Separated from its Ruling on Horse Betting.*

The first proposition is mistaken because the district court's ruling on horse betting *cannot* be separated from its holding on numbers activity without doing violence both to the indictment and to the judgment of acquittal. Reading the indictment most favorably to the Government, it charges the defendants with engaging in an illegal gambling business that encompassed two types of betting: (a) betting "on a pari-mutual [*sic*] number pool"; and (b) betting "on the result of a trial and contest of skill, speed and endurance of beast." The court of appeals argued that because of the enumeration of these two types of betting Sanabria

> "could possibly have made a pretrial objection to the indictment as duplicitous. If he had, the probable response of the district court would have been to give the government the option of proceeding on either a numbers theory or a horse betting theory. *See* 8 Moore's Federal Practice ¶8.04[1]. We can safely assume that, as to [Sanabria], the government would have opted for the former and that the case would have been tried solely on a numbers theory, a fact which would have required the district court formally to dismiss an entire count of the indictment when it ruled on defendant's motion." (A. 5a, n. 4.)

The short answer to this argument is that what motion Sanabria "could possibly have made," what the district court's "probable response" would have been, and what one can "safely assume" the Government "would have opted for" have

nothing to do with this case. Sanabria's rights must be determined on the basis of what happened, not what could have happened. What happened was that Sanabria was tried on a one count indictment encompassing both horse betting and numbers betting, and that, after being placed in jeopardy, he was acquitted. No amount of speculation can change these basic facts.

The second answer to the court's argument is that the indictment was *not* duplicitous. Duplicity is defined as "charging multiple offenses in a single count." 8 J. Moore, Federal Practice ¶8.03[2], p. 8-7 (2d ed., Nov. 1976 revisions). *Accord*, 1 Wright, Federal Practice and Procedure § 142 (1969). It is distinguished from charging the commission of a single offense by different means, a "technique of pleading . . . specifically authorized by [Fed. R. Crim. P. 7(c)] and . . . used by prosecutors to avoid variances between pleading and proof." *Ibid.*

The distinction between these two concepts is illustrated in *Driscoll* v. *United States*, 356 F. 2d 324, 331-332 (1st Cir. 1966). The defendants there challenged as duplicitous a count charging them with a violation of the wagering tax laws on the ground that the count accused each of them as both principal and agent, and hence with two crimes. The court rejected the challenge, however, because it found that the gravamen of the offense was "engaging in the business of accepting wagers either as principal or agent." 356 F. 2d at 331. Consequently, the court held that the case came within the rule permitting a single count to allege that "the defendant committed the offense . . . by one or more specified means." *Ibid.*

The same ruling applies here. 18 U.S.C. § 1955 makes it a federal crime to engage in "an illegal gambling business." The indictment in this case accused Sanabria and his codefendants with participating in such a business. Only one

"illegal gambling business" and one crime was charged. The indictment enumerated two types[5] of betting, not for the purpose of charging the existence of two discrete gambling businesses — and hence two crimes — but rather for the purpose of describing, in the alternative, two types of activity which the single gambling business encompassed. Consequently, since only one gambling business was alleged, and only one violation of § 1955 was charged, the indictment was not duplicitous. Indeed, if the charge of horse betting and numbers betting had been split into two counts, the indictment would have been subject to challenge as multiplicitous — that is, as charging one offense in two counts. *See* 1 Wright, Federal Practice and Procedure § 142 (1969).

Because the indictment here was never challenged as duplicitous, and could not properly have been found duplicitous even if it had been challenged, the district court's judgment of acquittal cannot be validly separated into horse betting and numbers activity components. The judgment of acquittal was a unitary judgment that Sanabria was not guilty under the single count indictment. Consequently, the Government cannot consistently concede, on the one hand, that there *cannot* be review of the district court's ruling on horse betting, and maintain, on the other, that there *can* be review of the district court's decision on numbers betting. There was only one indictment in this case and Sanabria's trial under that indictment terminated in a judgment of acquittal. To permit the Government to dissect and worry that result for the purpose of extracting a basis for further prosecution is to invite precisely those evils which the double jeopardy clause was designed to prevent. Indeed, such a ruling would provide a pernicious precedent that:

[5] This is assuming arguendo that the indictment adequately charged numbers, as well as sports, betting — a position petitioner rejected below and continues to reject here. See point IV below.

> "would allow the prosecutor to seek to persuade a second trier of fact of the defendant's guilt after having failed with the first; it would permit him to re-examine the weaknesses in his first presentation in order to strengthen the second; and it would disserve the defendant's legitimate interest in the finality of a verdict of acquittal." *United States* v. *Wilson*, 420 U.S. at 352.

B. *The Ruling on Numbers Activity was an Evidentiary Ruling.*

18 U.S.C. § 3731 provides that the Government may appeal from a decision

> "suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, *not* made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information . . ." (emphasis added).

The plain implication of this provision is that the Government may *not* appeal a decision excluding evidence made after the defendant has been placed in jeopardy. The court of appeals expressly recognized this and also seemed to recognize that, under *Fong Foo* v. *United States*, 369 U.S 141 (1962), the same conclusion is compelled by the double jeopardy clause (A. 6a, n. 5). Nevertheless, the court of appeals held that the Government could appeal here because Sanabria's characterization of the district court's action as an evidentiary ruling was "inaccurate." *Ibid.* According to the court of appeals, the district court's "critical ruling" was that "the indictment failed to charge a violation of § 1955 on a numbers theory." *Ibid.* That the numbers evidence was "subsequently formally excluded" was in the view of the court of appeals "immaterial since the earlier ruling rendered the evidence irrelevant in any case." *Ibid.*

The court of appeals' reasoning is strained, to say the least. Petitioner was tried with ten codefendants, all of whom joined in the motion with respect to the numbers evidence. Following the district court's determination of that motion — which, it should be noted, the court characterized as a "motion to strike" — the court and counsel for both sides engaged in the laborious process of separating the documentary horse betting evidence from the documentary numbers evidence so that the latter could be excluded. The case went to the jury on the horse betting evidence, and all of Sanabria's codefendants were convicted. In the face of this process, the contention that the district court's action was not "an evidentiary ruling" is simply not tenable.

As for the court of appeals' argument that the district court's ruling was not truly "evidentiary" because it was predicated on a ruling pertaining to the indictment, it need only be pointed out that there are countless times when a trial court is called upon to make a ruling on the relevance of a piece of testimony that requires it to determine the legitimate scope of the indictment. The fact that such rulings require underlying decisions regarding the indictment, however, hardly deprive them of their character as evidentiary rulings. But, under the court of appeals' formula, the Government would have a legitimate claim to appeal each of those rulings. Needless to say, that would plainly contradict the intent of § 3731 and this Court's interpretation of the double jeopardy clause.[8]

[8] The dispute which has arisen in this case over whether the district court's decision was or was not an evidentiary ruling leads to a more fundamental point. The very purpose of having the bright line test articulated in *Jenkins*, *Wilson* and *Serfass* is to avoid disputes over the type of hair-splitting distinctions in which the court of appeals' decision is entangled. Consequently, the whole inquiry into whether the district court's decision was or was not an evidentiary ruling is misguided, and the reasoning of the court of appeals must be rejected for this reason alone.

C. *Sanabria's Right to Double Jeopardy Protection is in No Way Diminished by the Fact that the District Court's Ruling on Numbers Activity can be Characterized as a Legal rather than a Factual Determination.*

Serfass, *Wilson* and *Jenkins* are unanimous in rejecting the notion that the character of a trial court's decision as either legal or factual has any impact on the consequences of that decision under the double jeopardy clause.

In *Serfass*, this Court permitted an appeal from a pretrial order despite the fact that the order was based on factual findings that could have constituted a defense on the merits at trial. In *Wilson*, the Court allowed an appeal from a post-verdict order notwithstanding that the order was predicated on factual determinations adduced from evidence presented at trial. In *Jenkins*, the Court found that an appeal was barred by the double jeopardy clause even though the Court stated it could not determine whether the order appealed from was "a resolution of the factual issues against the Government." 420 U.S. at 369-370. As the New York Court of Appeals stated in *People* v. *Brown*, 40 N.Y. 2d 381, 392 (1976), *pet. for cert. filed*, 45 U.S.L.W. 3284 (Sept. 7, 1976):

> "In Jenkins [the Supreme Court] could not have been more explicit in making it clear that the legal-factual dichotomy plays no role and that the concern of the double jeopardy clause extends no further than to question whether retrial might follow a successful prosecution appeal. . . ."

Thus, in finding that Sanabria's right to the protection of the double jeopardy clause was diminished because

> "[n]either the judge nor the jury ever focused on what the evidence of numbering activities established regarding defendant's conduct or on whether the alleged conduct was such that criminal liability could be imposed" (A. 8a),

the court below totally misconstrued this Court's decisions.

D. *Sanabria's Motion to Strike the Evidence of Numbers Activity was Not the Equivalent of a Motion for a Mistrial.*

The court of appeals found that Sanabria's motion to strike the evidence of numbers activity was tantamount to a defendant's voluntary motion for a mistrial because

> "as in the mistrial context, defendant elected to forego his valuable right to have his trial on numbers charges concluded by the first tribunal" (A. 11a).

This finding was plainly wrong for two reasons.

First, the set of expectations a defendant has when he voluntarily moves for a mistrial are entirely different from the expectations Sanabria had when he made his motion to exclude the evidence of numbers activity. A defendant voluntarily moving for a mistrial knows that, if his motion is granted, his trial will not be definitively concluded. Consequently, a defendant making such a motion can be fairly said to have consciously relinquished his valuable right to have his trial completed. When Sanabria made his motion, however, he knew that, if his motion was granted, and if the district court found that the evidence of his involvement in horse betting was insufficient, the trial would end in his favor. Thus, Sanabria did not in any sense relinquish his right to have his trial "concluded" and it is grossly unfair to regard him as if he had. Indeed, Sanabria no more relinquished his trial rights than any other defendant who requests an evidentiary ruling in his favor during the course of a trial.

Second, this Court has rejected the type of double jeopardy analysis, adopted by the court of appeals here, that would export mistrial standards to situations where mistrials did not in fact occur. When the *Jenkins* case was before the Second Circuit, Judge Lumbard took the view that the Government's appeal should be allowed under the same principles that allowed further prosecution following a mistrial. In finding that the appeal should not be allowed, this Court explicitly rejected Judge Lumbard's analysis because it determined that:

> "it is of critical importance whether the proceedings in the trial court terminate in a mistrial as they did in the *Somerville* line of cases, or in the defendant's favor, as they did here." 420 U.S. at 365, n. 7.

The Eighth Circuit reached a similar result in *United States* v. *Means*, 513 F. 2d 1329 (1975), where the Government sought review of a district court's mid-trial decision to dismiss the indictment on the grounds of prosecutorial misconduct. The Government argued that, for purposes of 18 U.S.C. § 3731 and the double jeopardy clause, the Eighth Circuit should find that before the district court's dismissal was entered "a mistrial occurred by operation of law." As the Supreme Court did in *Jenkins*, however, the Eighth Circuit rejected the mistrial analogy:

> "The situation presented herein is a trial which terminated in defendants' favor after jeopardy had attached, before a finding of guilt by the trier of fact, and with no determination by the trial court that due process precludes a retrial or that 'manifest necessity' or the ends of justice require a retrial." 513 F. 2d at 1333.

Precisely the same thing can be said of the instant case. Just as the mistrial analogy was rejected in *Jenkins* and *Means*, it must be rejected here.

III. The Decision Below Resolves Two Important Issues Regarding the Interpretation of 18 U.S.C. § 3731 and the Double Jeopardy Clause Never Decided by This Court — and Resolves them in a Way that Cannot be Permitted to Stand.

In the opening sentence of its opinion, the court of appeals declared that this case presents "substantial questions" concerning the Government's right to appeal from an adverse decision in a criminal case (A. 2a). These questions are indeed so substantial, and the lower court's treatment of them so inadequate, that they should be resolved by this Court.

A. *The Government's Right to Appeal from a Dismissal of a "Discrete Basis of Criminal Liability" that is Less than an Entire Count of an Indictment.*

18 U.S.C. § 3731 permits the Government to appeal from a district court decision "dismissing an indictment or information as to any one or more counts." The decision below, however, would permit the Government to appeal from a decision dismissing "any discrete basis of criminal liability"

regardless of whether that "basis of liability" constituted an entire count (A. 6a-7a). Such an "interpretation" not only offends the language of the statute; it also plainly violates the double jeopardy clause and undermines the integrity of judgments of acquittal.

One of the primary purposes of the double jeopardy clause is to protect the "defendant's legitimate interest in the finality of a verdict of acquittal." *United States* v. *Wilson*, 420 U.S. at 352, and n. 21. The rule proposed by the court below, however, would seriously subvert that interest because it would permit the Government to go behind judgments of acquittal in search of "appealable" legal rulings made during the course of trial that dismissed "discrete bases of criminal liability." That is to say, under such a rule, a judgment acquitting a defendant on a count of an indictment would no longer be final because the Government would still have the opportunity to appeal if it could show that the count encompassed "discrete bases of criminal liability" which had not been adjudicated on the facts but which had been dismissed on legal grounds. Indeed, the net result of such a rule would be very close to allowing the Government to appeal from all legal errors made during the course of a trial — a result expressly and consistently rejected by this Court. *E.g.*, *United States* v. *Jenkins*, 420 U.S. at 369; *United States* v. *Wilson*, 420 U.S. at 352. It is, therefore, essential that the rule proposed by the lower court be reviewed by this Court, and reversed.

B. *The Double Jeopardy Consequences of a Dismissal for Failure to Provide a Defendant with Sufficient Notice of the Charges Against Him.*

The court below observed that this Court has never passed on:

> "the issue of the double jeopardy consequences of a dismissal of a count of an indictment by reason of its failure to provide the criminal defendant with sufficient notice of the charges against him" (A. 7a).

The lower court then proceeded (at A. 8a) to distinguish such a dismissal both from

(1) adjudications that the defendant did not commit the crime charged; and

(2) adjudications that the alleged conduct was such that even if the defendant committed it, liability could not be imposed.

Because such a dismissal is not in either of these categories, the court argued, its double jeopardy consequences are minimal — so minimal, in fact, that the Government may appeal from such a dismissal regardless of whether it is entered after jeopardy has attached, and regardless of whether it becomes merged, as it did in this case, in a judgment of acquittal.

Both this conclusion, and the reasoning which the lower court followed to reach it, are woefully misguided. Indeed, the notion that dismissals are to be divided into three separate categories with three different sets of double jeopardy consequences is the antithesis of the bright line scheme which this Court began to establish in *Jenkins*, *Wilson* and *Serfass*. To reaffirm that scheme, and to fulfill the goals of simplicity, fairness, and predictability which it was designed to meet, this Court should review the lower court's decision and reject the categorization of dismissals which it needlessly proposes.

IV. The Court Below Decided Incorrectly an Important Question Involving a Defendant's Constitutional Right To Receive Notice of the Charges Against Him and to be Tried Only on the Charges Made by the Grand Jury that Indicted Him. This Decision Conflicts with the Fifth Circuit's Ruling in United States v. Prejean, 494 F. 2d 495 (1974).

The district court found that the indictment did not give adequate notice that the Government was proceeding against the defendant on a numbers, as well as on a horse betting theory, because the indictment cited a solitary provision of Massachusetts law which had been expressly construed to reach only gambling activity involving apparatus used in betting based on a game of competition, such as horse racing. The Massachusetts courts had consistently found that numbers betting was to be prosecuted under another provision of Massachusetts law, which the Government had not cited in the indictment.

In *United States* v. *Morrison*, 531 F. 2d 1089, 1094 (1st Cir. 1976), decided after the district court's ruling but before the decision below, the First Circuit, in confronting an indictment substantially identical to the one here, tacitly accepted this reading of Massachusetts law. Nevertheless, it found that the failure to cite the proper state statute was "harmless error" in view of the fact that the indictment did refer to "a pari-mutuel number pool."

In reaching this conclusion, the court incorrectly relied on Fed. R. Crim. P. 7(c)(3), a provision which plainly refers to errors in the citation of the statute of the crime charged — see the last sentence of Fed. R. Crim. P. 7(c)(1) — and can be of no aid to the Government where the statutory citation is substantively required as an essential element of the crime. In fact, as the Fifth Circuit held in *United States* v. *Prejean*, 494

F. 2d 495 (1974), the requirements for accuracy in a statutory citation serving this substantive purpose must be stringent indeed to protect a defendant's Sixth Amendment right to be fairly and unambiguously informed of the charges against him, and his Fifth Amendment right to be tried only on the charges made by the grand jury that indicted him. *See Cole* v. *Arkansas*, 333 U.S. 196 (1948); *Commonwealth* v. *Edelin*, Mass. Adv. Sh. (1976) 2795.

The defect in the indictment here was hardly a harmless miscitation. It was, rather, a substantive error of constitutional dimension that, at the least — taking the view most favorable to the Government — created a real ambiguity as to the precise charge on which the defendants had been indicted and on which the Government was proceeding. Consequently, the district court's decision to exclude the evidence of numbers activity was unquestionably correct, and the contrary ruling of the First Circuit must be reversed.

Conclusion.

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 28, 1977

Appendix A.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

No. 76-1016.

UNITED STATES OF AMERICA,
APPELLANT,

v.

THOMAS SANABRIA,
APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.
[Hon. Walter Jay Skinner, *U.S. District Judge*]

Before Coffin, *Chief Judge*,
McEntee and Campbell, *Circuit Judges*.

Frederick Eisenbud, Attorney, Department of Justice, with whom *James N. Gabriel*, United States Attorney, *Stephen H. Jigger*, Special Attorney, Department of Justice, and *Sidney M. Glazer*, Attorney, Department of Justice, were on brief, for appellant.

Francis J. DiMento, with whom *DiMento & Sullivan* and *Donald C. Tye* were on brief, for appellee.

December 29, 1976

COFFIN, *Chief Judge*. This case presents several substantial questions concerning the conditions under which the United States may appeal from an adverse decision in a criminal case.

In November, 1972, defendant-appellee Thomas Sanabria and fifteen others were indicted for conducting an illegal gambling business, encompassing both a numbers and a horse betting operation, in violation of 18 U.S.C. § 1955.[1] The one count indictment charged them with "accepting, recording and registering bets and wagers on a parimutual [sic] number pool and on the result of a trial and contest of skill, speed, and endurance of beast . . . a violation of the laws of the Commonwealth of Massachusetts, to wit, M.G.L.A. Chapter 271, Section 17. . . ." Following some three years of pre-trial activity, a jury trial of defendant and ten co-defendants commenced on November 10, 1975 in the federal district court for the district of Massachusetts. At trial, the government introduced evidence tending to show that defendants were involved in an illegal numbers and horse betting gambling business in Massachusetts.

After both sides had rested, defendant moved for a judgment of acquittal. He argued first that there was insufficient evidence of his involvement in horse betting gambling to support a conviction upon that theory and second that, regardless of the evidence of numbers activity, the government had failed sufficiently to allege a violation of the Massachusetts laws prohibiting such conduct and could not prosecute him on a numbers theory. Defendant reasoned that the only Massachusetts statute which was cited, Mass. Gen. Laws c. 217 § 17,

[1] Section 1955 makes it a federal crime to conduct an illegal gambling business that involves five or more persons and that is in substantially continuous operation for a period in excess of thirty days. It provides that "illegal gambling business" means "a gambling business which is a violation of the law of a State or political subdivision in which it is conducted."

has been interpreted by the Massachusetts courts as not to prohibit numbers activity, which, under the case law, is proscribed exclusively by *id.* § 7, *see Commonwealth* v. *Boyle*, 346 Mass. 1, 189 N.E. 2d 844 (1963). He therefore urged that there had not been a sufficient allegation of illegal numbers activity to permit the government to obtain a guilty verdict on that basis. This objection to the indictment had not been raised either in the pre-trial motions or in any objection to the introduction of evidence during the trial.[2]

The district court was persuaded by defendant's argument regarding Massachusetts law, and presumably because it thought that the citation of § 17 alone could have led a criminal defendant to believe that the government was not proceeding on a numbers theory, it held that the policy that criminal defendants receive notice of the charges against them would be violated if the numbers aspect of the case were permitted to proceed. Having concluded that the indictment could not be interpreted to charge accepting bets on a parimutuel numbers pool, the district court excluded the government's evidence of numbers activity. It then focused on the evidence of horse betting and, finding it insufficient, entered a judgment of acquittal for defendant.

The government now seeks appellate review of the district court's action. It concedes that there can be no review of the district court's ruling that there was insufficient evidence of horse betting to support a conviction. However, it seeks review of the district court's decision to exclude the charge based upon numbering activities, and it requests that we order a new trial on this portion of the indictment. If we have appellate jurisdiction, there is no question but that the govern-

[2] The record reflects that defendant was aware of the alleged defect in the indictment before the trial began. In a post-judgment colloquy with the trial judge, defendant's counsel stated that he had been prepared to raise his objections at the beginning of trial.

ment is entitled to the relief it seeks.[3] In *United States* v. *Morrison*, 531 F. 2d 1089, 1094 (1st Cir. 1976), which had not been decided at the time of the district court's action, we held that an indictment which was identical to that in the case at bar in all significant respects was sufficient to place the criminal defendant on notice that numbers activity was a basis upon which the government sought to establish criminal liability under § 1955. Defendant concedes that *Morrison* is controlling if we have appellate jurisdiction.

Since the government may appeal an adverse judgment in a criminal case only when authorized by statute, *see United Sanges*, 144 U.S. 310 (1892), the first question we must face is whether a statute authorizes this appeal. The relevant statutory provision, 18 U.S.C. § 3731, provides in pertinent part:

> "In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.
>
> . . . . . .
>
> "The provisions of this section shall be liberally construed to effectuate its purposes."

[3] Although neither party addresses this point, we observe that we see no problem with permitting a trial on only a portion of a count of an indictment. As we discuss later, see n. 4, "severance" of a count is the general practice when a count of an indictment is duplicitous, *see* 8 Moore's Federal Practice ¶8.04[1], and this strongly suggests that there is no barrier to having a retrial proceed on only that portion of the indictment which charges a § 1955 violation on a numbers theory.

In deciding whether the present appeal is authorized thereunder, we must determine. first, whether the district court's action was the dismissal of an indictment "as to any one or more counts" within the meaning of § 3731, and, second, whether the double jeopardy clause will prohibit further proceedings against the defendant under § 1955 based upon allegations of numbers activity. The latter question, of course, pertains both to our appellate jurisdiction and to the constitutionality of such further proceedings against defendant.

The first issue arises because the district court's action was not formally a dismissal of an entire count. The portion of the indictment that charged pari-mutuel numbers activity was part of the same count that charged horse betting; after the district court removed the numbers charge from the case, the single count of the indictment still charged a crime. Although the district court did not remove an entire count from the indictment, its action clearly eliminated one basis for imposing criminal liability on defendant.[4] We think this fact is suf-

[4] If the government had succeeded in establishing that defendant had engaged in a gambling business which registered bets on a pari-mutuel numbers pool and which satisfied the other requirements of § 1955, it would plainly have proven a violation of that statute. And such a charge could have been the subject of a separate count in an indictment.

We observe that defendant could possibly have made a pretrial objection to the indictment as duplicitous. If he had, the probable response of the district court would have been to give the government the option of proceeding on either a numbers theory or a horse betting theory. *See* 8 Moore's Federal Practice ¶8.04[1]. We can safely assume that, as to this defendant, the government would have opted for the former and that the case would have been tried solely on a numbers theory, a fact which would have required the district court formally to dismiss an entire count of the indictment when it ruled on defendant's motion.

The possibility of such a scenario fortifies our conclusion that the word "count" in 18 U.S.C. § 3731 should be liberally construed. We can see no reason why the government's ability to appeal should depend upon whether the defendant previously challenged the indictment as duplicitous.

ficient, assuming no double jeopardy bar, to make the district court's action reviewable at the behest of the government.[5]

By permitting appeals from orders dismissing single counts of an indictment, Congress manifested an intention that district court orders eliminating a single ground of criminal liability from a prosecution would normally be appealable. We can think of no substantial policy which would be served by prohibiting government appeals from an order dismissing a criminal charge when that charge did not formally comprise an entire count of an indictment. The sole practical effect of such a narrow construction of § 3731 would be that, in such cases only, the government would be obliged to reindict the criminal defendant before attempting to reprosecute. There is no indication, either in the statute or its legislative history, that the use of the word "count" was intended either to limit the instances in which the government could appeal or to force the government, in certain instances, to reindict the criminal defendant before it could attempt to proceed against him anew. On the contrary, the legislative history indicates that Congress intended to remove all statutory barriers to government appeals and permit appeals from an unfavorable termination of a criminal charge whenever the double jeopardy clause does not prohibit further proceedings. *See United*

[5] Noting that the evidence of numbering activity was excluded from the case, defendant attempts to characterize the district court's action as a judgment of acquittal which arose from an erroneous evidentiary ruling and, citing *Fong Foo* v. *United States*, 369 U.S. 141 (1962), argues that no appeal may be taken. Although § 3731 seems also to support the conclusion that an evidentiary ruling made after jeopardy had attached cannot form the basis for an appellate challenge to a judgment of acquittal, defendant's characterization of the district court's action is inaccurate. The critical ruling by the district court was that the indictment failed to charge a violation of § 1955 on a numbers theory. This ruling was in no way predicated upon an erroneous evidentiary ruling. That the numbers evidence was subsequently formally excluded is immaterial since the earlier ruling rendered the evidence irrelevant in any case.

States v. *Wilson*, 420 U.S. 332, 337-39 (1975). Noting also that the last sentence in § 3731 provides that it is to be "liberally construed to effectuate its purposes", we interpret the word "count" in the statute to refer to any discrete basis for the imposition of criminal liability that is contained in the indictment. Here, the district court effectively dismissed the portion of the indictment charging a § 1955 violation based on the defendant's alleged numbering activities. Under our construction of § 3731, therefore, this order is appealable if the double jeopardy clause does not bar a future prosecution on this charge.

Turning to this question, we find that the issue of the double jeopardy consequences of a dismissal of a count of an indictment by reason of its failure to provide the criminal defendant with sufficient notice of the charges against him has not been addressed by the Supreme Court. However, a series of recent decisions of the Court persuades us that the policies embodied in the double jeopardy clause will not be offended if defendant is prosecuted sometime in the future for allegedly engaging in numbers activities under circumstances constituting a § 1955 violation.

The double jeopardy clause comes into play only when the criminal defendant has previously been "placed in jeopardy" on the charges in question. *Serfass* v. *United States*, 420 U.S. 377 (1975). Here, there appears to be no question but that defendant was placed in jeopardy on the numbers charge since the jury was empaneled and sworn, *see Downum* v. *United States*, 372 U.S. 734 (1963). Although it might plausibly be argued that the district court's conclusion that defendant had not been charged on a numbers theory prevented jeopardy from attaching, *cf. Kepner* v. *United States*, 195 U.S. 100, 133 (1904), it apparently is settled that jeopardy attaches upon the institution of trial proceedings, even if the indictment is

defective. *See Illinois* v. *Somerville*, 410 U.S. 458, 466-67 (1973); *United States* v. *Ball*, 163 U.S. 662 (1896).

The fact that defendant was placed in jeopardy of course "begins, rather than ends, the inquiry." *Illinois* v. *Somerville*, *supra*, 410 U.S. at 467. The fundamental value embodied in the clause is the belief that, since repeated prosecutions cause a variety of hardships, subject the defendant to a continuing state of anxiety, and enhance the possibility that, although innocent, he may be found guilty, the state with its vast resources should not be permitted repeatedly to attempt to convict an individual for an alleged offense. *See Green* v. *United States*, 355 U.S. 184, 187-88 (1957). Since a second prosecution of an individual does not always seriously implicate this fundamental value and since there is a countervailing public interest in having criminal prosecutions terminate in just judgments, criminal defendants have never been held to have an absolute right to be placed in jeopardy only once on any given criminal charge. *See United States* v. *Jorn*, 400 U.S. 471, 484 (1971) (plurality opinion); *United States* v. *Tateo*, 377 U.S. 463, 466 (1964). Although the policies protected by the double jeopardy clause are implicated the instant jeopardy attaches, the public and private interests at stake are such that whether a criminal defendant who has once been the subject of a criminal prosecution will enjoy protection against future proceedings depends upon the reason the first prosecution ended.

The numbers based proceeding against defendant was terminated solely because he was deemed not to have received sufficient notice of the charges against him. Neither the judge nor the jury ever focused on what the evidence of numbering activities established regarding defendant's conduct or on whether the alleged conduct was such that criminal liability could be imposed. Because of this fact, a future prosecution in this case will not threaten one of the principal private interests protected by the clause: the criminal defendant's

interest in preserving a district court's ruling that he is not criminally responsible. Here, the trier of fact had no occasion to consider whether defendant engaged in conduct that constituted a violation of § 1955. Accordingly, there is no question of the state attempting "to persuade a second trier of fact of the defendant's guilt after having failed with the first."[6] *United States* v. *Wilson*, *supra*, at 352. Neither was the numbers based charge dismissed because the judge made a purely legal determination that the defendant's alleged conduct was such that criminal liability could not be imposed. Thus, this case does not present the difficult,[7] and presently open, *see Serfass* v. *United States*, *supra*, at 394, question whether a defendant, who prevails at trial because of the trial judge's interpretation of the substantive criminal law, but who had an opportunity to raise his defense on the merits pretrial, has a right under the double jeopardy clause not to be prosecuted again. *Compare United States* v. *Kehoe*, 516 F.

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[6] Where a trial terminates after the trier of fact resolved, or may have resolved, the factual issues determinative of criminal liability favorably to the defendant, the clause bars all further proceedings on that charge. *United States* v. *Jenkins*, 420 U.S. 358 (1975). But where the trier of fact initially resolved these factual issues against the criminal defendant, a future proceeding or prosecution does not violate the clause, *see United States* v. *Pearce*, 395 U.S. 711, 717 (1969), even when, following the determination by the trier of fact, the court entered a judgment of acquittal on the merits. *United States* v. *Wilson*, *supra*.

[7] That issue is a difficult one because the criminal defendant has received a determination, after jeopardy attached, that he must prevail on the merits. Although the foregoing suggests that the most fundamental values protected by the clause are substantially implicated in such a case, the matter is complicated since the defendant could have raised his legal defense on the merits prior to trial, before any of the values protected by the clause were implicated. The decision of this question requires a delicate accommodation between the private interests at stake and the public interest in having criminal convictions end in just judgments. Happily, we need not attempt to strike this balance here.

2d 78, *rehearing and rehearing en banc denied*, 521 F. 2d 815 (5th Cir. 1975), *cert. denied*, ___ U.S. ___ (1976) *with United States* v. *Lucido*, 517 F. 2d 1 (6th Cir. 1975) *and People* v. *Brown*, 40 N.Y. 2d 446, 19 Crim. L. Rep. 2318 (New York June 17, 1976), *petition for cert. filed*, 45 U.S.L.W. 3317 (Oct. 4, 1976).

What is involved, however, is the criminal defendant's general interest in being tried only once. This is a substantial interest but one which frequently is subordinated to the public interest in having prosecutions terminate in just judgments. As a general matter, when a prosecution ends without a ruling on the criminal defendant's criminal liability as such, a future prosecution will not offend the double jeopardy clause so long as neither the prosecutor nor the judge had been able to manipulate events so that the defendant would be forced to "forego his valued right to have his trial completed by a particular tribunal." *Wade* v. *Hunter*, 336 U.S. 684, 689 (1949). Typically, the issue arises in cases in which the first prosecution terminated with a declaration of a mistrial, and here the rules are clear. When the mistrial is declared either sua sponte or upon a motion by the prosecutor, there will be no double jeopardy bar to future proceedings if "manifest necessity" or "the ends of public justice" required the mistrial order. *See United States* v. *Sanford*, ___ U.S. ___ (Oct. 12, 1976); *Illinois* v. *Somerville*, *supra*. More significantly for this case, when the defendant moves for a mistrial as the result of developments in the prosecution which are not attributable to prosecutorial or judicial overreaching, the motion "is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial errors." *United States* v. *Jorn*, *supra*, at 485; *see United States* v. *Dinitz*, ___ U.S. ___ (March 8, 1975).

We believe the cases permitting future prosecutions of defendants whose first trials ended in mistrials following their

motions control this case. Here, as in the mistrial context, defendant elected to forego his valuable right to have his trial on numbers charges concluded by the first tribunal. He did so because he believed — incorrectly as it turns out — that, because of a prosecutorial error, the indictment insufficiently alleged a § 1955 violation on a numbers theory. Defendant has not made, nor can he make, any suggestion that the government intentionally manipulated events to gain some advantage at the first trial or to force defendant to forego his right to proceed before the first tribunal. Indeed, both the record in the case and the logic of our decision in *United States* v. *Morrison*, *supra*, virtually compel the conclusion that the indictment placed defendant at no disadvantage at the first trial. Since defendant voluntarily requested termination of proceedings based upon the numbers activities before there had been any determinations regarding either his conduct or its legal consequences, and since there can be no suggestion that defendant's request was attributable to developments resulting from prosecutorial or judicial overreaching, we hold that there is no double jeopardy bar to a future prosecution on this cause. In so holding, we note that we are following at least one of our sister circuits. *See United States* v. *DiSilvio*, 520 F. 2d 247 (3d Cir.), *cert. denied*, 423 U.S. 1015 (1975).

We observe that had the government foreseen the possible objection to the indictment during the trial, called it to the court's attention, and requested the court to declare a mistrial if it believed such an objection would be well taken, *Illinois* v. *Somerville*, *supra*, would appear to compel the conclusion that the double jeopardy clause would not have barred further proceedings following a declaration of mistrial. Certainly, the government's right to institute further proceedings cannot be any the less when the defendant, not it, makes the motion that results in the termination of a cause.

We conclude that the district court's action in dismissing the numbers based charge is reviewable under § 3731. As we have already indicated the district court, not having the benefit of *Morrison*, erred in terminating this aspect of the prosecution. The judgment of the district court is, therefore, vacated and the case is remanded so that the government may try defendant on that portion of the indictment that charges a violation of § 1955 based upon numbering activities.

So ordered.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

No. 76-1016.

UNITED STATES OF AMERICA,
APPELLANT,

v.

THOMAS SANABRIA,
DEFENDANT, APPELLE.

JUDGMENT

Entered December 29, 1976

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: That portion of the judgment that acquitted the defendant of the charge of a violation of § 1955 based upon numbers activities is vacated, and the cause is remanded for a trial on that portion of the indictment that charges a violation of § 1955 based upon numbers activities. The balance of the judgment of the District Court is affirmed.

By the Court:

/s/ DANA H. GALLUP
Clerk.

Appendix B.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA
VS. CRIMINAL NO. 72-326-S

THOMAS SANABRIA

JUDGMENT OF ACQUITTAL
November 18, 1975

SKINNER, J.

On the 10th, 11th, 12th, 13th, 14th and 18th days of November, 1975 came the attorney for the government and the defendant Thomas Sanabria appeared in person and by counsel, Francis DiMento, Esq., and

The defendant having been set to the bar to be tried for the offense of unlawfully engaging in an illegal gambling business, in violation of Title 18, United States Code, Sections 1955 and 2, and the Court having allowed defendant's motion for judgment of acquittal at the close of government's evidence,

It is hereby ORDERED that the defendant Thomas Sanabria be, and he hereby is, acquitted of the affense charged, and it is further ORDERED that the defendant Thomas Sanabria is hereby discharged to go without day.

WALTER JAY SKINNER
U.S. District Judge

Appendix C.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

INDICTMENT

UNITED STATES OF AMERICA

v. CRIMINAL NO. 72-326-W

HARVEY T. PLOTKIN, RUTH LYNCH,
STEVEN J. EMERSON, BONNIE R. GLIXMAN,
JOSEPH GLIXMAN, DOMINIC L. SERINO,
JOSEPH W. WILKER, PHYLLIS FRANKLIN,
ARTHUR PLOTKIN, JOHN MOCCIA, JULIUS
SILVERMAN, JOHN J. CONSIDINE, JR.,
DAVID SHERMAN, THOMAS SANABRIA,
BERNARD HARRIGAN, JOHN WOLLEN

The grand jury charges:

From on or about June 1, 1971 and continuing thereafter up to and including November 13, 1971 at Revere Massachusetts within the District of Massachusetts,

HARVEY T. PLOTKIN, a/k/a "TEDDIE", of Revere
RUTH LYNCH, of Revere
STEVEN J. EMERSON, of East Boston
BONNIE R. GLIXMAN, of Revere
JOSEPH GLIXMAN, of Revere
DOMINIC L. SERINO, of Revere

JOSEPH W. WILKER, of Newton
PHYLLIS FRANKLIN, of Revere
ARTHUR PLOTKIN, of Revere
JOHN MOCCIA, a/k/a "JAKE", of Revere
JULIUS SILVERMAN, a/k/a "JULIE", of Malden
JOHN J. CONSIDINE, JR., a/k/a "JACKIE", of Revere
DAVID SHERMAN, a/k/a, "YARBO", of Swampscott
THOMAS SANABRIA, of Boston
BERNARD HARRIGAN, of Malden
JOHN WOLLEN, of Nashua, New Hampshire

did unlawfully, knowingly, and wilfully conduct, finance, manage, supervise, direct and own all and a part of an illegal gambling business, to wit, accepting, recording and registering bets and wagers on a parimutual number pool and on the result of a trial and contest of skill, speed, and endurance of beast, said illegal gambling business; (i) was a violation of the law of the Commonwealth of Massachusetts, to wit, M.G.L.A. Chapter 271, Section 17, in which place said gambling business was being conducted; (ii) involved five and more persons who conducted, financed, managed, supervised, directed and owned all and a part of said business; (iii) had been in substantially continuous operation for a period in excess of thirty days and had a gross revenue of two thousand dollars ($2,000) in any single day; all in violation of Title 18, United States Code, Section 1955 and 2.